No. 17-1104

IN THE

Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., *et al.*,
Petitioners,

v.

ROBERTA G. DEVRIES,
Individually and as Administratrix of the
Estate of John B. DeVries, Deceased, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ["AAJ"] is a voluntary national bar association whose members practice in every state. AAJ members primarily represent plaintiffs in personal injury, civil rights, employment rights, and consumer rights litigation. Many AAJ members represent asbestos victims and their families.

AAJ is concerned that defense contractors like Petitioners, and others who marketed machines and equipment that required post-sale installation of asbestos components, seek absolute immunity from accountability for their failure to take reasonable steps to warn U.S. military personnel of the serious dangers they would encounter in the ordinary course of using and maintaining that machinery.

SUMMARY OF ARGUMENT

1) Manufacturer liability for negligently failing to warn of dangers to users presented by installation or replacement of an integral component after the product's delivery to the purchaser falls well within common-law tort and product liability principles. Such a cause of action should therefore be recognized under federal maritime law.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.

The court below properly rejected Petitioners' proposed bright-line rule precluding any liability for harm caused by products not made or sold or distributed by defendant, that is, for harm caused by products outside the manufacturer's "chain of distribution." The lower court did not impose upon manufacturers a duty to warn of dangers posed by every other product that might conceivably be used with or near defendant's product. Instead, the Third Circuit properly allowed a negligence cause of action to proceed in the narrow circumstance where a dangerous addition or replacement is so integral to the manufacturer's finished product that it may be deemed a component part of the manufacturer's product, though installed post-sale. Requiring the manufacturer to take reasonable steps to warn users of known dangers associated with that component strikes an appropriate balance of fairness and accountability.

(a) Such a carefully confined duty to warn – not Petitioners' bright-line rule denying any obligation to warn in all circumstances – comports with settled tort law principles. Although there is no general common-law duty to rescue a stranger from dangers created by a third party, such a duty may arise when the defendant's own conduct has placed the plaintiff in a dangerous position.

In this case, Petitioners knew that the machinery they supplied to the Navy would not be placed into service until it was coated by highly dangerous asbestos insulation. They knew that asbestos-containing internal components would be

replaced by similar components many times during the life of the equipment. Having played a role in placing Navy personnel at risk for asbestos-caused disease, Petitioners owed them at least the obligation to take reasonable steps to alert them of the danger and of procedures to reduce it. A similar obligation attends the use of components that will necessarily require replacement. The duty to warn is analogous to the duty owed by the maker of a gas can to warn of the dangers of inhaling gasoline fumes, though the can's contents will necessarily be replaced many times.

(b) This duty to warn also comports with settled principles of product liability law. The court below carefully circumscribed the duty of a product manufacturer to warn users of dangers posed by asbestos that was added post-sale. That duty arises only where (a) the product was originally equipped with an asbestos-containing part that is expected to be replaced, (b) the manufacturer specifically directed that the product be used with an asbestos-containing part, or (c) the product required an asbestos-containing part to function properly. In short, a duty to warn attaches only if the add-on asbestos may fairly be viewed as an integral component of the manufacturer's finished product. That was the case here, where manufacturers knew that the equipment they supplied to the Navy would not be placed into service without asbestos insulation and would require regular replacement of asbestos-containing internal parts.

A majority of state courts that have addressed this issue, in addition to well-reasoned decisions by federal courts, are in accord with the narrowly tailored position taken by the Third Circuit in this case. Moreover, the decisions relied upon by Petitioners do not support the no-duty they advocate.

(c) Many of the contentions propounded by Petitioners and supporting amici are straw man arguments that do not address the question presented. First, Petitioners rewrite the decision below as imposing liability based solely on foreseeability that a manufacturer's product might be used with or near another's product. Stretching that notion to logical extremes may yield absurd results, but it bears no resemblance to the lower court's actual holding.

Additionally, Petitioners seek to cast much of the responsibility for the harm in this case onto the United States Navy. Respondents, of course, cannot hold the Navy accountable. The government's immunity from suit for injuries incurred during active military service ought to be revisited and rejected. But it does not justify conferring immunity on private military contractors for failing to warn military personnel of deadly dangers associated with using and maintaining their equipment.

Finally, Petitioners suggest that asbestos victims seek compensation from asbestos trust funds established to provide compensation to those harmed by the asbestos products of now-bankrupt companies. Solvent defendants contributed nothing to those funds. The asbestos trusts are woefully

underfunded, providing only pennies on the dollar to asbestos victims for their injuries. Solvent defendants who are held liable in asbestos litigation are generally entitled to an offset for payments plaintiffs have received from asbestos trusts. But the asbestos trusts do not exist to subsidize an immunity for solvent defendants at the expense of future asbestos victims.

2) The fact that insurance coverage is available for liability arising out of asbestos exposure occurring decades ago supports imposition of the duty to warn recognized in this case. Although indemnity coverage is not essential to recognizing a duty to exercise due care, its availability, allowing a manufacturer to spread the risk of loss among the broader public, supports the imposition of such a duty.

Indemnity coverage for liability indemnity for asbestos harms is available under commercial general liability policies. Indeed, some Petitioners in this case have indicated that they have obtained such coverage.

Even accepting that companies manufacturing machines designed for the addition of asbestos insulation or replacement parts could not have anticipated liability for the negligence alleged in this case, retroactive insurance and reinsurance is available. Retroactive underwriting is premised on the fact that insurers receive premiums when the policy is written and can profitably invest those premium dollars until such time that they are required to make indemnity payments to injured plaintiffs.

Following the publicized purchase of retroactive liability coverage following the 1980 fire at the MGM Grand Hotel in Las Vegas, such coverage has become well accepted. Because asbestos-related diseases often do not become manifest until decades following exposure, coverage for liability for asbestos harms is well suited to retroactive insurance. For this reason, insurance covering liability for asbestos losses has proved profitable.

One company that has thrived by underwriting asbestos liability coverage is Berkshire Hathaway, Inc. By engaging in loss portfolio transfers through its insurance subsidiaries, Berkshire enables other insurers to remove long-term contingent liabilities from their books while providing Berkshire a "float" of premium dollars to invest. The company has amassed the largest portfolio of asbestos coverage in the world. Berkshire chairman Warren Buffett has repeatedly highlighted for shareholders the profitability of this strategy, strongly indicating that liability insurance for asbestos injury will remain readily available.

The same strategy also provides a financial incentive for insurers to maximize the time they can invest premiums by delaying and denying even valid claims. In fact, accusations have surfaced that Berkshire has engaged in such a strategy. However, reversal in this case and denial of a cause of action for asbestos victims would bestow a windfall on insurers.

3) The court below gave proper weight to the longstanding principle of maritime law that the rights of seamen are worthy of special solicitude. For nearly 200 years, this Court has consistently recognized that the rights of seamen are worthy of judicial protections because they are "wards of the admiralty." Recently this Court emphatically rejected arguments that modern seafarers have no need for this special solicitude. Affirmance of the Third Circuit's recognition of a negligence cause of action increasing the protections of U.S. Navy sailors and other seafarers is wholly consistent with the historic maritime principles of this Court.

ARGUMENT

I. MANUFACTURER LIABILITY FOR NEGLIGENTLY FAILING TO WARN OF SERIOUS DANGER TO USERS DUE TO THE INSTALLATION OR REPLACEMENT OF AN INTEGRAL COMPONENT OF THE MANUFACTURER'S PRODUCT FALLS WELL WITHIN SETTLED PRINCIPLES OF TORT AND PRODUCTS LIABILITY LAW.

The American Association for Justice addresses this Court regarding the primary question presented in this case. Petitioners contend that under maritime law a manufacturer owes no duty to warn of, and cannot be liable for harm caused by a product made or sold by another. Petitioners' Br. 22; General Electric ["GE"] Br. 2-3. Phrased differently,

Petitioners contend that product liability is confined to the manufacturer's "chain of distribution." Petitioners' Br. 20. In this case, decedents were exposed to asbestos in insulation installed after delivery of Petitioners' equipment ("bare-metal" products) or to asbestos contained in replacement parts installed post-sale (wear-and-tear products). Neither Mr. DeVries nor Mr. McAfee were exposed to asbestos that was actually supplied by Petitioners. Under Petitioners' proposed bright-line rule, "[t]hat should be the end of the inquiry." GE Br. 2.

The court below determined otherwise. The Third Circuit did not impose a duty to warn on every supplier of every product that might foreseeably be used with or near asbestos. The court did hold that in the relatively narrow circumstance where asbestos serves as an integral component of the final product, though expected to be added later, the manufacturer owes a duty to take reasonable steps to warn users of this hazard. That rule strikes the appropriate balance of fairness and accountability.

A. Accepted Tort Principles Recognize a Duty to Warn Those Who Are Placed in Danger by the Defendant's Conduct.

Petitioners complain that liability for harm caused by asbestos products that they did not manufacture or supply would violate "foundational tort-law principles," Petitioners' Br. 20, and "represent an unprecedented expansion of strict products liability." GE Br. 21. In fact, the duty to warn those whom

the defendant has placed in danger is a settled tort law principle.

Petitioners invoke a basic proposition that a defendant "owes no duty to protect the public from dangers that third parties create." Petitioners' Br. 21, citing Restatement (Second) of Torts § 315 (1965). To uphold the Third Circuit's decision, Petitioners contend, "would amount to imposing a duty to rescue." *Id.*

There are exceptions and caveats and restrictions to the no-duty principle. *See, e.g.*, Restatement (Second) of Torts §§ 321-325; Ernest J. Weinrib, *The Case for A Duty to Rescue*, 90 Yale L.J. 247, 248 (1980) ("[M]any of the outposts of the doctrine that there is no general duty to rescue have fallen."). One that is particularly applicable in this case provides: "A defendant whose conduct creates a risk of physical or emotional harm can fail to exercise reasonable care by failing to warn of the danger" if the defendant knows of the risk and knows that those encountering the risk will not be aware of it. Restatement (Third) of Torts: Liab. For Phys. & Emot. Harm § 18 (2010). *See also* Restatement (Second) of Torts § 321 (similar).

Significantly, the danger need not be the result of the defendant's negligence. Nor is the duty to warn limited to dangers associated with objects or persons that are within the defendant's control. *See, e.g.*, Weintrib, *supra*, at 257 (noting recent case law recognizing "that the very act of taking a person out in one's boat constitutes participation in the creation

of the danger of drowning" that would give rise to a duty to rescue).

In this case, Petitioners were very aware from the Navy's specifications that their turbines and other equipment would be put into service only after being insulated with asbestos. Petitioners also knew that Navy personnel would be working in close proximity to their asbestos-insulated machines. The court below found no duty to rescue Navy personnel or to take any action to prevent the use of asbestos with their equipment. The duty in this case extends only to taking reasonable steps to warn of a danger associated with the use and maintenance of Petitioners' own machines. Petitioners and their supporting amici cannot credibly contend that such a duty offends fundamental tort precepts.

Petitioners claim it would be "absurd if a boater could sue the seller of marine gasoline for failing to warn about the risks of boating at high speeds." Petitioners' Br. 20. A closer analogue to the case at bar would be the duty of the maker of the marine gas can to warn against storing in closed cabin sleeping quarters, even though the gasoline that harmed plaintiffs who breathed toxic fumes was not made or supplied by the defendant.

B. Products Liability Law Recognizes a Manufacturer's Duty to Warn of Dangers Presented by a Component Part of the Manufacturer's Product, Even Where the Component Is Incorporated into the Product After Delivery.

Petitioners' primary assertion is that, as a bright-line rule of land-based products liability law, a product supplier cannot be liable for "injuries caused by third-party products foreseeably used with its own." Petitioners' Br. 22. This restriction "limiting liability to those inside a product's chain of distribution is a 'fundamental principle' of products-liability law." Petitioners' Br. 23.

The Third Circuit carefully defined the scope of its duty-to warn rule. A "bare-metal manufacturer may be subject to liability" if it not only knew of the hazards in asbestos, but also knew that "its product will be used with an asbestos-containing part, because (a) the product was originally equipped with an asbestos containing part that could reasonably be expected to be replaced over the product's lifetime, (b) the manufacturer specifically directed that the product be used with an asbestos-containing part, or (c) the product required an asbestos-containing part to function properly." *In re: Asbestos Prod. Liab. Litig. (No. VI)*, 873 F.3d 232, 240 (3d Cir. 2017) (footnotes omitted).

There is little doubt that the asbestos containing additions to Petitioners' bare-metal equipment satisfied the third element. Petitioners themselves

refer to the record evidence that that without insulation "the ship's systems 'would be inefficient due to loss of heat[,] and sailors would be burned or unable to operate in engineering spaces due to heat levels,'" and that, at the time, there was no acceptable substitute for asbestos parts and insulation. Petitioners' Br. 5, quoting JA36 (Affidavit of Retired Rear Admiral Roger B. Horne). *See also* JA37 (The Navy had made clear that "asbestos thermal insulation was essential to safe and efficient operation of its ships.").

The court's analysis thus rejected the bright-line rule of immunity proposed by Petitioners. But the court did not impose liability simply on the basis that defendant's product could foreseeably be used in conjunction with asbestos. Instead, the court limited the duty to warn to those circumstances where asbestos was so important to the function of the manufacturer's product that it may be deemed a component part, even though it was installed after the manufacturer delivered its product to the Navy. As one district judge insightfully posited in an early similar case,

> GE argues that it did not manufacture its marine steam turbines with any asbestos materials and, therefore, Chicano could not have inhaled asbestos fibers from its turbines. However, GE's argument overlooks the fact that its products are component parts of finished products, because *the turbines cannot function properly or safely without thermal insulation.*

Chicano v. Gen. Elec. Co., No. Civ.A. 03-5126, 2004 WL 2250990, at *3 (E.D. Pa. Oct. 5, 2004) (emphasis added). *See also Schwartz v. Abex Corp.*, 106 F. Supp. 3d 626, 654-55 (E.D. Pa. 2015) ("[A] product manufacturer has a common law duty to warn about the asbestos hazards of a *component part* later used with its product, which it neither manufactured nor supplied (i.e., an aftermarket component), if the manufacturer knew its product would be used with that type of asbestos-containing *component*...") (emphasis added).

The fact that the component was installed after delivery of the bare-metal machine precludes the manufacturer's strict liability for the unreasonably dangerous insulation or replacement part. *See* Restatement (Second) of Torts § 402A (imposing strict liability for unreasonably dangerous product when it leaves the defendant's control and "is expected to and does reach the user or consumer without substantial change..."). But Petitioners seek immunity from any obligation whatever, even to take reasonable steps to advise Navy sailors of the dangers they are exposed to when working near Petitioners' machinery.

The clear majority of state courts have adopted the middle ground position described by the Third Circuit. *See, e.g., Whelan v. Armstrong International, Inc.*, 2018 WL 3716036, at *1 (N.J. Aug. 6, 2018) ("[A] duty to warn exists when the manufacturer's product contains asbestos components, which are *integral to the function of the product*, and the

manufacturer is aware that routine periodic maintenance of its product will require the replacement of those components with other asbestos-containing parts.") (emphasis added); *In re N.Y.C. Asbestos Litig.*, 59 N.E.3d 458, 463 (N.Y. 2016) ("[T]he manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is *necessary to enable the manufacturer's product to function as intended.*") (emphasis added); *McKenzie v. A.W. Chesterton Co.*, 373 P.3d 150, 160-62 (Or. Ct. App. 2016), rev. denied, 381 P.3d 841 (2016) (rejecting "bare metal" defense with respect to failure to warn of dangers of asbestos-containing replacement components); *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 1000 (Md. 2015) (The bare-metal manufacturer owes a duty to warn "when (1) its product contains asbestos components, and no safer material is available; (2) asbestos is a critical part of the pump sold by the manufacturer; (3) periodic maintenance involving handling asbestos gaskets and packing is required; and (4) the manufacturer knows or should know the risks from exposure to asbestos."); *Garvin v. AGCO Corp.*, No. 2012-CP-40-6675, 2014 WL 8628438, at *7-8 (S.C. Ct. C.P. Dec. 10, 2014) (manufacturer may be liable for harm caused by asbestos-containing replacement parts when the manufacturer "recommends, specifies, or requires that asbestos gaskets and packing be replaced with like materials..."); *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069, 1076 (Wash. 2012) (liability of manufacturer of respirator where plaintiff who developed mesothelioma from exposure

to asbestos while cleaning respirators; distinguishing cases where equipment "only happened to be insulated by asbestos" from the present circumstance where defendant's product "by its very nature would necessarily involve exposure to asbestos.").

Petitioners suggest that their proposed rule, that "product manufacturers are not liable for injuries caused by products made, sold, and distributed by others" is "traditional tort doctrine." Petitioners Br. 13. It is not, and the decisions Petitioners cite do not support such a rule. For example, Petitioners rely on *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 471-72 (11th Cir. 1993) for the proposition that "a tire manufacturer has no duty to warn about the dangers of the wheels for which the tire is specifically designed." Petitioners Br. 13 & 19. But the reason the court found no duty to warn was not the purported rule against warning of another product's dangers. Rather, "Lampley was an experienced tire changer who was aware of the dangers associated with mounting tires on multi-piece rims." *Reynolds*, 989 F.2d at 471. More typical of the common law is *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 609–10 (W. Va. 1983), where the court upheld the liability of the manufacturer of a radial tire for failure to warn the user against mixing radials with conventional tires, which could result in loss of control.

Nor is *Acoba v. Gen. Tire*, 986 P.2d 288, 305 (Haw. 1999) in accord with Petitioners' no-duty rule. See Petitioners' Br. 19. In *Acoba* the court stated, "*Assuming arguendo that Firestone had the duty to warn Romero*" of the dangers of mounting its tires

on multi-piece rims, Firestone discharged that duty by providing adequate warnings in its safety and service manual. *Id.* at 302–03 (emphasis added).

Petitioners also cite *Childress v. Gresen Mfg. Co.*, 888 F.2d 45 (6th Cir. 1989), as holding that "the maker of a component part commissioned for use in a log splitter need not investigate whether the component is safe for its intended use." Petitioners Br. 13 & 22. However, that case did not involve an allegation that the log splitter maker owed a duty to warn the user of any danger. Nor was there an allegation that the component valve was inherently dangerous. Rather plaintiffs alleged that the valve maker should have supplied a different valve to reduce the danger. *Id.* at 48-49. The decision does not illustrate Petitioners' hoped-for rule.

Finally, Petitioners assert that the court in *O'Neil v. Crane Co.*, 266 P.3d 987, 991 (Cal. 2012) found "no liability for third-party asbestos-containing replacement parts." Petitioners Br. 22. *See also* ATRA Br. 9; PLAC Br. 14. However, the California court there held only that foreseeability alone could not support liability for failure to warn. In *O'Neil*, "the evidence did not establish that defendants' products needed asbestos-containing components or insulation to function properly." 266 P.3d at 1004. As the Maryland high court observed, *O'Neil* and other decisions suggest that where the use of asbestos insulation was not only foreseeable, but necessary to the proper function of defendant's machine, defendant owes a duty to warn. *May*, 129 A.3d at 995–96.

C. Arguments Advanced Against the Decision Below Fail to Address the Products Liability Issue Before This Court.

As one district court has stated, "the recent trend in state court asbestos litigation has been to recognize limited circumstances in which a manufacturer can have duties to warn regarding a product that the manufacturer did not make, sell, or otherwise control." *Bell v. Foster Wheeler Energy Corp. et al.*, No. 15-6394, 2016 WL 5780104, at *2 (E.D. La. Oct. 4, 2016).

Candidly, however, this is not the universal rule; nor have the courts arrived at a uniform test. Refined analysis would assist the courts below. Instead, Petitioners and supporting amici expend extraordinary effort in constructing and then demolishing straw men, an effort that offers no assistance to this Court or to others who will preside over the trials arising out of similar tragic circumstances.

1. The Lower Court Did Not Impose Liability on Foreseeability Alone.

First and most glaringly, those who want this Court to reverse strive mightily to rewrite the Third Circuit's opinion so that its conclusions might be dismissed as "absurd." Petitioners' Br. 20.

In Petitioners' recasting, the Third Circuit holding was "based on its mistaken belief that foreseeability alone creates a duty. That is wrong..." Petitioners' Br. 40-41. *See also* ATRA Br. 7

("Respondents and the Third Circuit justify their theory based on foreseeability," but "foreseeability, like light, travels indefinitely in a vacuum," quoting *Thing v. La Chusa*, 48 Cal. 3d 644, 659 (1989)).

It is clear from the Third Circuit's holding, quoted above, that the court carefully limited its duty to warn of foreseeable harm to the narrow circumstance where asbestos is so integral to the operation of defendant's machine as to be a component part. Nevertheless, Petitioners insist that on a ship, "most things are connected to other things" so that affirming "would risk imposing liability on *everyone* who made or sold a product incorporated into a ship's (or a building's, or a car's) asbestos-containing systems." Petitioners' Br. 33.

Petitioners stretch their mistaken premise to ridiculous lengths. "The home chef who buys a butcher's knife would hardly expect a warning about the dangers of other products—undercooked meat, for example." Petitioners' Br 20. Similarly, Petitioners invite us to laugh at the notion that a maker of hockey skates would owe a duty to warn of the importance of a secure helmet or that a swimsuit maker should warn of the importance of checking the pool's depth before diving. *Id.* ATRA adds that the sellers of tools that could be used with asbestos-containing materials "such as power saws, sanders, drills, hammers, or chisels, also could face liability." ATRA Br. 17. Indeed, manufacturers might require "research facilities to identify potential dangers with respect to all products that may be used in

conjunction with or in the vicinity of their own products." *Id.* at 20.

The asbestos insulation and internal parts that killed the Navy personnel in this case were not simply products that happened to be used near Petitioners' machinery. Indeed, the after-installed asbestos was not at all a stranger to the Petitioners' "chain of distribution." The defense contractors knew in great detail the Navy's specifications for the turbines, compressors, valves, and other equipment the Navy was buying from them. Petitioners knew that the Navy would not use these machines until vital asbestos insulation and packing were in place. They knew that asbestos components would require replacement many times, generating airborne fibers that threatened the Navy sailors on board with deadly cancer, unless stringent precautions were taken. Complete immunity from accountability would invite arrangements in which major military contractors seek out lucrative contracts to deliver equipment that is slightly unfinished, with known hazardous material added by small, thinly insured subcontractors. It would offer no incentive for suppliers to warn the military personnel of dangers lurking in their equipment.

But Petitioners and supporting amici focus their firepower on the an open-ended "pure foreseeability" test that the Third Circuit did not adopt.

2. Attempts to Focus on the Role of the United States Navy are Not Relevant to the Duty Question.

Petitioners emphasize that the Navy "controls what goes on its ships" and "exercised that control to require the use of asbestos,", even though the Navy "knew that asbestos could be dangerous" and as early as 1922 was aware of precautions for working with it. Petitioners' Br. 3-4. Respondent General Electric in particular argues that "the Navy *alone* was in charge of deciding the appropriate form of insulation on its ships," GE Br. 3, that asbestos insulation of its machinery was applied initially by the shipbuilder, and later upon maintenance or overhaul, by the Navy itself or shipyard/repair facility "in accordance with Navy specifications." *Id.* at 5. Imposing liability on GE "would be especially improper in the military setting, where the Navy exercised plenary authority over the use and control of asbestos for its warships." *Id.* at 22.

It comes with ill grace that Petitioners seek to shift attention in this way to the Navy's responsibility for the deaths of its sailors who ultimately perished not in wartime, but due to their service time on toxic ships. The government is itself immune from suit with respect to any negligence on its part. *Feres v. United States*, 340 U.S. 135 (1950). It is an immunity that is overdue to be cast aside. *See* Brief of Amicus Curiae American Association for Justice in Support of the Petition for a Writ of Certiorari, *Read v. United States*, 571 U.S. 1095 (2013) (No. 13-505), 2013 WL 6174913 (2013) (supporting Petition

seeking to overturn *Feres* rule); Brief of Amicus Curiae American Association for Justice in Support of Petition for a Writ of Certiorari, *Witt v. United States*, 564 U.S. 1037 (No. 10-885), 2011 WL 493955 (2011) (same); Brief of Amici Curiae Association of Trial Lawyers of America, et al., *Sonnenberg v. United States*, 498 U.S. 1067 (No. 90-539) (1991) (same).

However, the government's *Feres* immunity provides no support for extending immunity to private contractors.

3. Attempts to Divert Attention to the Asbestos Trusts are Not Relevant.

Another straw man argument erected by Petitioners proposes that the victims of asbestos exposure file claims with "asbestos trusts" rather than assert their failure to warn claims against solvent defendants like Petitioners. *See* Petitioners' Br. 37; *see also* ATRA Br. 23-27 ("*Billions* of dollars are available in trusts to pay asbestos claimants.") (emphasis in original).

Congress in 1994 amended the Bankruptcy Code to allow companies to get out from under massive liabilities arising out of their manufacture and distribution of asbestos products while ensuring some measure of compensation would be available to victims and their families. *See* 11 U.S.C. § 524(g). Companies could obtain special treatment in reorganization by establishing a trust under state law to pay the present and future claims of those who can

establish exposure to the bankrupt's asbestos products. *See generally* Lloyd Dixon et al., RAND Inst. for Civil Justice, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, 5-10 (2010), *available at* http://www.rand.org/pubs/technical_reports/TR872.html.

It is not known whether Respondents could establish eligibility for claims payments from any of the asbestos trusts. What is known is that those trusts are woefully underfunded in view of the multitude of severely injured individuals and families of those killed by asbestos. In fact, RAND's in-depth investigation of claims paid out by the trusts found that claimants often receive only "pennies on the dollar" in comparison with payments of claims in litigation. Stephen J. Carroll et al., RAND Inst. for Civil Justice, *Asbestos Litigation*, 102 (2005), *available at* http://www.rand.org/pubs/monographs/MG162. Moreover, to preserve assets for future claims, funds available for current claimants have been steadily reduced. *Id.* Asbestos trust funds do not represent any realistic alternative source of compensation for Respondents.

What is also known is that solvent defendants such as Petitioners have not contributed to any asbestos trust fund. Nevertheless, defendants who are found liable for asbestos injury are generally entitled under state law to a set-off for amounts plaintiffs have received from an asbestos trust, though the amounts and the procedures for calculating it vary widely among the states. *See* Lloyd Dixon &

Geoffrey McGovern, RAND Inst. for Civil Justice, *Asbestos Bankruptcy Trusts and Tort Compensation*, xiii-xvi (2011), *available at* http://www.rand.org/pubs/monographs/MG1104.html.

Essentially Petitioners and supporting amici propose to this Court that Petitioners be gifted with immunity from any accountability for negligence and that, instead, injured victims and families be directed into a compensation regime that was not funded by solvent entities like Petitioners, that can pay only a tiny fraction of the value of victims' losses, and that must make such payments at the expense of future asbestos victims.

II. THE AVAILABILITY OF INSURANCE COVERING LIABILITY FOR ASBESTOS CAUSED HARM, INCLUDING HARM CAUSED BY LONG-AGO EXPOSURE, SUPPORTS RECOGNITION OF THE MANUFACTURER'S DUTY TO WARN OF DANGERS OF ASBESTOS COMPONENTS.

A. Insurability of Loss Due to Negligence Is Not Essential to Duty to Exercise Due Care.

One rationale Petitioners proffer to justify their desired immunity in this case is that liability insurance cannot be obtained for such long-ago asbestos exposure. Petitioners contend, "it is far from clear that insurance will be available . . . given the uncertainty of the risk." Petitioners' Br. 47. *See also*

PLAC Br. 7 (The proposition that manufacturers should be subject to product liability only where the manufacturer can insure against risks, "is foundational."); *id.* at 8-9 (A purpose of products liability is to spread the risk of harm through manufacturer's insurance.).

However, courts have observed that not only is insurance available to indemnity liability for negligent failure to warn in cases such as this, but that "the availability of insurance counsels in favor of imposing a duty." *May*, 129 A.3d at 994. In fact, the court in that case observed that the bare-metal manufacturers "implicitly acknowledge in their brief that they have some pre–1986 insurance coverage available to them." *Id.* Similarly, in *In re N.Y.C.*, 59 N.E.3d at 473, the New York Court of Appeals disagreed that liability for failure to warn regarding asbestos components would "saddle manufacturers with an untenable financial burden, especially given that they can obtain insurance coverage for this type of liability."

Spreading the risk of harm through manufacturer's liability insurance is most frequently advanced as a rationale supporting strict liability without fault. *See, e.g.*, Restatement (Second) of Torts § 402A, comment c. ("[T]he justification for the strict liability has been said to be that . . . the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained."). The source of this rationale is Justice Traynor's

concurrence in *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring): "[T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." Similarly, liability for negligent failure to warn of dangers of an asbestos-containing component not within the manufacturer's chain of distribution would be justified by the fact that liability insurance is available. *In re N.Y.C.*, 59 N.E. 3d at 473.

Is such insurance available to indemnify liability arising from failure to warn and asbestos exposure occurring decades ago? The *May* court raised this question as well, asking whether consideration of the availability of insurance, as a factor to be weighed in determining whether to impose a duty, should be "forward-looking" only. The court answered, No. *May*, 129 A.3d at 994.

B. Liability Insurance for Harm Caused by Long-Ago Asbestos Exposure.

1. Coverage under Commercial General Liability policies covers claims against manufacturers of bare-metal equipment for harm caused by subsequently-installed asbestos.

In fact, insurance for asbestos-related liability is available. Absent exclusion, Commercial General Liability policies cover indemnity for asbestos-caused disease. Such policies have covered suppliers of "bare-metal" machinery that was subsequently insulated with asbestos-containing insulation from

other suppliers. *Appalachian Ins. Co. v. Gen. Elec. Co.*, 863 N.E.2d 994 (N.Y. 2007). In that case, the New York high court observed that following the industry shift "from 'accident' to 'occurrence' based" coverage in 1966, such "gradually occurring losses would be covered so long as they were not intentional." *Id.* at 1000 (quoting *Continental Cas. Co. v. Rapid–American Corp.*, 609 N.E.2d 506 (N.Y.1993)). That included coverage of "liability arising from asbestos exposure or contamination." *Id.* The court determined that both primary and excess coverage was available at that time for claims against suppliers of bare-metal equipment, like GE, for harm due to installation of "asbestos-containing products manufactured by others." *Id.* at 995.

2. Retroactive insurance is available to manufacturers of equipment who may be subject to asbestos-related claims.

Understandably, Petitioners and other "bare-metal" equipment suppliers might not have anticipated that they might be liable many years in the future for asbestos-related harm or obtained sufficient insurance to cover such eventualities. However, "retroactive" insurance coverage for future liability arising out of past conduct is available, including for asbestos injury.

On the morning of Friday, November 21, 1980, a fire broke out in the delicatessen at the MGM Grand Hotel and Casino in Las Vegas. The fire, caused by faulty wiring, spread through the casino and caused thick smoke and toxic gas to fill the 26-

story high-rise where 3,400 people were registered as guests. Eighty-four people died, and over 1,000 persons suffered injuries due to smoke inhalation and injuries suffered in trying to escape the fire. *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913, 915–16 (D. Nev. 1983). "After the fire, safety specialists discovered significant building and fire code violations that may have contributed substantially to the fire." Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 Brook. L. Rev. 961, 974 (1993).

The legal fallout included more than 3,000 liability claims for wrongful death, personal injury and property damage. At the time of the fire, MGM Grand Hotels, Inc. carried an inadequate $30 million of liability insurance coverage written on a layered basis by four different insurance companies. For a premium of $38.3 million, insurance services company Frank B. Hall Inc. underwrote up to $170 million in claims from the fire's victims. Hall then placed the first $35 million of coverage with its own subsidiary, the Union International Insurance Company. The notion of obtaining insurance on one's hotel after it had burned down attracted the attention of popular press. *See, e.g.*, Tamar Lewin *Insurance for Past Risks*, N.Y. Times, April 6, 1982, at D2.

Ultimately, the courts approved MGM's $75 million settlement with the fire victims in January 1983, and Union finally settled in April, 1984, paying MGM $75.9 million. *Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 729 P.2d 1352, 1353 (Nev. 1986).

"Retroactive liability insurance" had found a place in the property/casualty insurance market. *See* Stephen P. Baginski et al., *Catastrophic Events and Retroactive Liability Insurance: The Case of the MGM Grand Fire*, 58 Journal of Risk and Insurance 247 (1991); Michael L. Smith & Robert C. Witt, *An Economic Analysis of Retroactive Liability Insurance*, 52 Journal of Risk and Insurance 379 (1985).

Obviously, this type of coverage is most profitable for insurers in circumstances that provide time for premium investment to grow. Diseases caused by asbestos, for example, may remain latent for 40 years following exposure. *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 168 (2003) (Kennedy, J., dissenting in part). During that time, the insurer is able to invest the premiums it has collected. Indeed, asbestos producer Johns-Manville Corp. suggested the purchase of such insurance to guarantee payment of claims under its reorganization plan. Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or A Pandora's Box?*, 53 Fordham L. Rev. 527, 574 (1984).

With respect to asbestos liability, "Retroactive insurance is thus a very attractive alternative." *Id.* Consequently, "retroactive reinsurance is still available today, and it is gaining popularity as insurers seek creative ways to remove long-latent asbestos liabilities from their balance sheets without dipping into policyholder surplus." Joanne Wojcik, *Reinsurers writing retro cover for asbestos*, Business Insurance (June 23, 2002) *available at* http://www.businessinsurance.com/article/20020623/STORY/10

0011210?template=printart. Indeed, as one observer has stated that insurers covering asbestos liability claims:

> [H]ave weathered the financial aspect of the asbestos storm quite well . . . With all its faults, the asbestos mass tort has significant traits tending to advantage insurers. Adjudication and payment of the claims has extended over decades, postponing payment. This allows insurers to garner years of investment income and to pay claims in dollars whose real value has been substantially reduced by inflation.

Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 Conn. Ins. L.J. 349, 350–51 (2006). See also *id.* at 354 ("Despite being required to provide considerable asbestos coverage, general liability insurance as a whole has been a profitable venture from 1943 to the present.").

One company that has thrived on underwriting asbestos liability coverage, and retroactive liability coverage in particular, is Berkshire Hathaway, Inc. Since 2000, many insurers have used "loss portfolio transfers" with Berkshire to rid themselves of policies producing losses long after issuance (i.e., policies with "long-tail" risk) – including policies producing costly asbestos liability. Laura A. Foggan & Richard A. Ifft, *Retroactive Reinsurance and Loss Portfolio Transfers: Bad faith scheme or a*

normal and healthy part of the insurance industry, ABA Insurance Coverage Litigation Committee CLE Seminar (Mar. 5-8, 2014).

One example is British insurer CGNU, which paid Berkshire Hathaway's subsidiary National Indemnity Co. ("NICO") $1.25 billion for $2.5 billion in retroactive reinsurance of liability for asbestos and environmental claims on policies issued prior to 1987, with no time limit on payouts. A CGNU officer explained that the hefty premium "was worth the peace of mind it ensured" by removing the uncertain claims from the company's books and perhaps clearing a path for an acquisition. Wojcik, *supra*.

Berkshire Hathaway has relied on such transactions, using NICO and other insurance subsidiaries, to amass "the largest concentration of long-tail risk in the industry and in history." Jonathan Terrell, *Berkshire Hathaway and Loss Portfolio Transfers: Do They Make Sense?*, ABA Insurance Coverage Litigation Committee CLE Seminar, p. 4 (Mar. 5-8, 2014).

Warren Buffett, Berkshire Hathaway's Chairman and Chief Executive, in his report to shareholders, has explained his enthusiasm for what he calls "the float":

> Insurers receive premiums upfront and pay claims later . . . This collect-now, pay-later model leaves us holding large sums - money we call "float" – that will eventually go to others. Meanwhile, we

> get to invest this float for Berkshire's benefit . . . . This . . . allows us to enjoy the use of free money – and, better yet, get *paid* for holding it.

Berkshire Hathaway, Inc., *2009 Annual Report to Shareholders*, p. 6, *available at* http://www.berkshirehathaway.com/2009ar/2009ar.pdf.

By 2015, Warrant Buffet was able to announce to shareholders: "Berkshire's huge and growing insurance operation again operated at an underwriting profit in 2015 – that makes 13 years in a row. . . . During those years, our float – money that doesn't belong to us but that we can invest for Berkshire's benefit – grew from $41 billion to $88 billion." Berkshire Hathaway, Inc., *2015 Annual Report to Shareholders*, p. 5, *available at* http://www.berkshirehathaway.com/2015ar/2015ar.pdf.

In the latest Annual Report, Buffett clearly states to shareholders that the company intends to remain an underwriter of asbestos liability insurance for the foreseeable future:

> Berkshire has been a leader in long-tail business for many years. In particular, we have specialized in jumbo reinsurance policies that leave us assuming long-tail losses already incurred by other p/c insurers. As a result of our emphasizing that sort of business, Berkshire's growth in float has been extraordinary.

Berkshire Hathaway, Inc., *2017 Annual Report to Shareholders*, p. 7, *available at* http://www.berkshirehathaway.com/2017ar/2017ar.pdf.

Clearly, the largest players in the market of long-tail asbestos liability insurance and reinsurance have found the incentives that suggest such coverage will be available and prevalent for the foreseeable future. Concerns regarding the insurability of claims do not warrant denial of this failure-to-warn cause of action to asbestos victims and their families.

The darker side of such incentives, however, raises separate concerns. Insurers who profit from investing the "float" during time until claims are payable have an obvious financial incentive to deny claims and delay payments for as long as possible.

Journalists and industry insiders have inquired into cases where Berkshire Hathaway and other asbestos claims insurers have been accused of pursuing a deny-delay strategy. *See, e.g.*, Mark Greenblatt, *Berkshire Hathaway subsidiaries deny, delay asbestos, hazard claims, suits, insiders allege*, Scripps News (Oct. 6, 2013), *available at* http://www.wptv.com/news/local-news/investigations/berkshire-hathaway-subsidiaries-deny-delay-asbestos-hazard-claims-suits-insiders-allege_20140102230128180; Terrell, *supra*, at 5; John Sylvester, *Policyholder Litigation Involving Claims Handling by Resolute Management Inc.*, ABA Insurance Coverage Litigation Committee CLE Seminar (March 5-8,

2014) (focusing on allegations against practices of Berkshire's claims management subsidiary); John M. Sylvester & Max Louik, *Policyholder Litigation Involving Claims Handling by Resolute Management Inc. 2015 Update*, ABA Insurance Coverage Litigation Committee CLE Seminar (March 5-7, 2015), *available at* http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015/2015_inscle_materials/written_materials/5_3_policyholder_litigation_involving_claims_handling_by_resolute_management.authcheckdam.pdf (collecting additional cases); Dean Starkman, *AIG's Other Reputation: Some Customers Say the Insurance Giant Is Too Reluctant to Pay Up*, Wash. Post (Aug. 21, 2005), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/08/20/AR2005082000179.html [http://perma.cc/V4AF-W36K] (reporting on allegations against AIG, which subsequently reinsured much of its asbestos coverage with Berkshire).

Reversal by this Court and denial of the failure to warn cause of action to asbestos victims would represent a windfall to reinsurers who have already collected premiums to cover such claims and have made substantial investment profits.

III. THIS COURT HAS HISTORICALLY AND CONSISTENTLY SHOWN SPECIAL SOLICITUDE FOR THE RIGHTS OF SEAMEN.

Petitioners place heavy emphasis on the notion that maritime law favors simple and uniform

rules. *See* Petitioners' Br. 15; GE Br. 16. The court below upheld a uniform rule that mirrors the common law duty to take reasonable steps to warn seamen of hazards posed by components that will be added to a manufacturer's equipment. Petitioners' proposed rule – no liability, ever – may have the advantage of greater simplicity, but lacks both compassion and justice. Petitioners further emphasize that the purpose of maritime law is the "protection of maritime commerce." *See* Petitioners' Br. 34; GE Br. 16. It is difficult to discern how this purpose is furthered by shielding companies who furnish the equipment needed to move commerce from any incentive to advise seamen how to safely install and maintain that equipment.

The Third Circuit weighed these policy matters, Pet. App. 13a-14a, but determined that maritime law's "special solicitude for the safety and protection of sailors is dispositive." *Id.* at 15a. Petitioners respond in this Court that the characterization of sailors as a class needing "special solicitude" are "disparaging," "worse than outdated," and "downright absurd." Petitioners' Br. 38.

This Court has consistently upheld and restated its rule according special solicitude to seamen seeking justice in American courts. "Seamen from the start were wards of admiralty." *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355 (1971) (citing *Robertson v. Baldwin*, 165 U.S. 275, 287 (1897). Early in our nation's history, Justice Story declared: "Every Court should watch with jealousy an encroachment upon the rights of a seaman . . . . Courts

of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty." *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C. Me. 1823). *See also Ramsay v. Allegre*, 25 U.S. 611, 620 (1827) (Johnson, J., concurring) (characterizing seamen as "emphatically the wards of the Admiralty"). As such, "their rights, wrongs, and injuries" have long been "a special subject of the admiralty jurisdiction." *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932). Indeed, this Court has referred to seamen as the "wards of admiralty" in at least 24 decisions. David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 La. L. Rev. 463, 499 n.107 (2010).

This Court's special solicitude for the rights of those who go down to sea in ships has been consistent. "From the earliest times maritime nations have recognized that unique hazards, emphasized by unusual tenure and control, attend the work of seamen." *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724, 727 (1943). Moreover, "the restrictions which accompany living aboard ship for long periods at a time combine with the constant shuttling between unfamiliar ports to deprive the seaman of the comforts and opportunities for leisure, essential for living and working, that accompany most land occupations." *Id.*

In *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995), Justice O'Connor wrote for the Court that Justice Story's famous "wards of the Admiralty"

characterization served as the "animating purpose behind the legal regime governing maritime injuries." Judicial solicitude for seafarers stands as a "feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected." *Id.* at 355.

Most recently, in a case involving the scope of damages recoverable under maritime law, the maritime industry urged this Court to cast aside "the inaccurate, outdated 'wards of admiralty' stereotype." Petitioners' Reply Br. 19, *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009) (No. 08-214). The vessel owner and employer there contended that seamen today are educated, they have the benefit of computers and modern communications devices, and many belong to unions. *Id.* at 22-23. Thus, "no basis exists in law or fact for the assumption that seamen need special protections," including the remedy of punitive damages. *Id* at 23.

This Court rejected that flawed reasoning and reaffirmed that the Jones Act added to the preexisting remedies provided by maritime law "for the benefit and protection of seamen who are peculiarly the wards of admiralty." *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 417 (2009) (quoting *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936)).

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the judgment of the Third Circuit Court of Appeals.

Respectfully submitted,

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